IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. Z-508091
AND ALL OTHER SEAMAN'S DOCUMENT
Issued to: W. H. SHELBY

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1675

W. H. SHELBY

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 16 February 1967, an Examiner of the United States Coast Guard at San Francisco., California, revoked Appellant's seaman's documents upon finding him guilty of misconduct. The specification found proved alleges that while serving as a messman aboard the United States SS MONTEREY under authority of the document above described, on or about 27 May 1967, at Auckland, New Zealand, Appellant had in his possession a dangerous drug, Indian Hemp.

At the hearing, Appellant was represented by professional counsel. Appellant entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence an authenticated copy of an entry in the Criminal Record Book of the Magistrate's Court of Auckland, New Zealand.

In defense, Appellant testified in his own behalf.

At the end of the hearing, the Examiner rendered a decision in which he concluded that the charge and specification had been proved. The Examiner then entered an order revoking all documents issued to Appellant.

The entire decision was served on 17 February 1967. Appeal was timely filed on 17 March 1967, and was perfected on 17 November 1967.

## FINDINGS OF FACT

On 26 May 1966, Appellant was serving as a messman on board the United States SS MONTEREY and acting under authority of his document while the ship was in the port of Auckland, New Zealand.

Appellant had in his possession on board the vessel some Indian Hemp. He was arrested by local police and charged with a violation, by such possession, of the New Zealand Dangerous Drugs Act. While under arrest he was interviewed by the American counsel.

The next day, accompanied by counsel, Appellant appeared in the Auckland Magistrate's Court and pleaded guilty of the charge. He was fined 150 New Zealand pounds.

## BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is contended that there was no jurisdiction in this case, because the offense charged did not come within the provisions of 46 U.S.C. 239b, which is asserted to be the only source of authority to proceed in a case like this. It is also said the decision is "against the weight of the evidence".

APPEARANCE: Kiriakis and Sullivan, San Francisco, California, by John F. Sullivan, Esquire

## OPINION

### I

The first basis of appeal presented is that there is no jurisdiction. The argument is that 46 U.S.C. 239b is the only source of authority to proceed in a case involving narcotics, and that under this statute there must either have been a conviction in a United States, Territorial, State, or District of Columbia court, or the party must be shown to be a user or addict of narcotics. Since the conviction in this case occurred in a New Zealand court, the matter does not come within the statute.

With most of the theory of the argument on appeal there can be no disagreement. A conviction in a New Zealand court cannot be the basis for action under 46 U.S.C. 239b.

But this was not such an action, and the fact was made quite clear in the course of the hearing itself. 46 U.S.C. 239b is not the sole source of authority for action to revoke a document in a narcotics case.

The charge here was brought under 46 U.S.C. 239 (R.S. 4450), and the charge was "misconduct". An act of misconduct may be the basis of a suspension and revocation proceeding if it is committed while the holder of the document is serving under authority of the document. Here, Appellant was serving aboard MONTEREY and was

found in possession of narcotics.

He was not charged with conviction of a narcotics law violation but with possession of the narcotic. The record of conviction in the New Zealand court is merely evidence of possession, albeit very persuasive evidence, and it is the possession of Indian Hemp, an act of misconduct under R.S. 4450, that was found proved.

46 U.S.C. 239b is, on its face, not a limitation of jurisdiction under 46 U.S.C. 239, but obviously a grant of new jurisdiction to extend to certain cases in which the party is not serving under authority of his document.

There was jurisdiction under R.S. 4450 in this case.

II

Appellant asserts that the Examiner's findings are "against the weight of the evidence". This consideration is not a test review of an Examiner's decision in a proceeding like this. The decision may, and should be, affirmed if there is "substantial" evidence to support findings.

As a general rule, once a prima facie case has been established there is substantial evidence in the record so that an examiner's decision may be sustained against any quantum of opposing evidence. The exception would be when the counter-evidence would, as a matter of law, destroy the prima facie case and when, also as a matter of law, the trier of facts had arbitrarily and capriciously, and beyond his discretionary scope, rejected the evidence.

In the instant case, the prima facie case was established by evidence that Appellant had been convicted in a New Zealand court upon his plea of guilty to prohibited possession of a narcotic while he was serving aboard MONTEREY. If the counter-evidence were such as to prove, for example, that no such record of conviction existed or that a different person of the same name was involved, it might be said that the Examiner had acted in arbitrary and capricious fashion.

Appellant's evidence in this case attacked the weight of the evidence against him by contesting the merits of his conviction and by repudiating his plea of guilty. There seems no doubt that the way was open for Appellant to attack the foreign judgment, because no principle of res judicata is involved nor is the conviction conclusive as one would be under 46 U.S.C. 239b. But the Examiner was free to accept or reject Appellant's testimony that he felt

coerced into pleading guilty in the Auckland court even though he was in fact innocent.

It must be noted that even if Appellant had pleaded "not guilty" at Auckland the conviction would still be substantial evidence against him. However, as the Examiner has appropriately pointed out, the reason given by Appellant for his pleading guilty (the convenience of paying a relatively small fine rather than awaiting a contested trial and thus missing his ship) is as consistent with guilt as with innocence.

Appellant has made a point, both at hearing and on appeal, that he chose to pay fine of a "mere" $150.00. Whether the error here known to Appellant or not, I must note that Examiner's finding, based upon the court record in evidence, is that the fine was for 150 New Zealand pounds, over $400. This misstatement does not add to the credibility of Appellant's case.

In concluding that Appellant's evidence did not persuade him that the prima facie case had been refuted, the Examiner referred to a fundamental discrepancy in Appellant's explanation. While he acknowledge that he had been aware of the existence of the shoes in which the narcotic was found for a period of ten months, Appellant claimed that he had never paid any attention to them. Still, as the Examiner noted, Appellant gave a precise estimate of the size of the shoes. This by itself could be enough to render Appellant's testimony suspect. Still, there is another point which the Examiner has not mentioned.

Despite his acknowledgment that he knew that the shoes had been left behind by an earlier occupant of his room, and his disclaimer of having examined them, Appellant, when he was asked on cross-examination when he had first become aware of the presence of the shoes in his room, said (R-39), "When the ship was searched". Before a party can expect an examiner to give serious consideration to efforts to rebut so strong a case as is presented by a conviction after a plea of guilty in a court, his own testimony must be at least self-consistent.

It must be made clear, however, that the decision here does not turn on such things as the incorrect statement of the amount of fine assessed or the implausibilities or contradictions in Appellant's testimony. This decision is bottomed on the fundamental power of the examiner as trier of facts. The facts he found, possession of a narcotic by Appellant while serving aboard MONTEREY, are based on substantial evidence. They will not, therefore, be disturbed.

ORDER

The order of the Examiner dated at San Francisco, California, on 16 February 1967, is AFFIRMED.

P.E. TRIMBLE
Vice Admiral, U.S. Coast Guard
Acting Commandant

Signed at Washington, D.C., this 27th day of December 1967.

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